SUPREME COURT, U. S.

MAY 29 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 1368

October Term, 1968

CAPTAIN HENRY BECK, Superintendent of the Pulaski County Penal Farm; and CLINT CAVIN, Surety,

Petitioners,

v.

ROBERT WINTERS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JACK GREENBERG
MICHAEL MELTSNER
NORMAN CHACHKIN
10 Columbus Circle
New York, New York, 10019

JOHN WALKER
1820 West 13th Street
Little Rock, Arkansas

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.
Attorneys for Respondent

INDEX

PAGE

Brief in Opposition to Petition for a Writ of Certiorari 1

Statement 2

Reasons for Denying the Writ—

I. The Court of Appeals Correctly Held That the Arkansas Restriction of Appointment of Counsel at Trial to Those Indigent Defendants Charged With Felonies Under Arkansas Law Violates the Sixth and Fourteenth Amendments to the Constitution 6

II. The Unconstitutionality of Arkansas' Dollar-a-Day Statute Establishes the Correctness of the Judge Below 13

Conclusion 17

Table of Cases

Arbo v. Hegstrom, 261 F. Supp. 317 (D. Conn. 1966) 11

Baker v. Binder, 274 F. Supp. 658 (W.D. Ky. 1967) 16
Baxstrom v. Herold, 383 U.S. 107 (1966) 8
Bohr v. Purdy, —— F.2d —— (5th Cir. 1969, No. 26,637) 10
Brinson v. Florida, 273 F. Supp. 840 (S.D. Fla. 1967) 10
Burns v. Ohio, 360 U.S. 252 (1959) 9, 14

Callan v. Wilson, 127 U.S. 540 (1888) 8, 12
Cheff v. Schnackenberg, 384 U.S. 373 (1966) 12

Destefano v. Woods, 392 U.S. 631 (1968) 12

PAGE

District of Columbia v. Clawans, 300 U.S. 617 (1937) 12
Douglas v. California, 372 U.S. 353 (1963) 9, 14
Douglas v. Green, 363 U.S. 192 (1960) 9
Duncan v. Louisiana, 391 U.S. 145 (1968) 11, 12

Eskridge v. Washington Prison Board, 357 U.S. 214 (1958) 9
Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942) 6

Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426 (1967) 16
Fish v. State, 159 So.2d 866 (Fla. 1964) 10
Frank v. United States, 37 U.S.L. Week 4437 (May 19, 1969) 12

Gideon v. Wainwright, 372 U.S. 335 (1963) 5, 6, 12, 14
Griffin v. Illinois, 351 U.S. 1 (1956) 9, 14

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 15
Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965) 10

James v. Headley, —— F.2d —— (5th Cir. 1969, No. 25,892) 10
Jones v. Cunningham, 371 U.S. 236 4

McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965) 10
McLaughlin v. Florida, 379 U.S. 184 (1964) 8

People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686 (1966) 15, 16
Petition of Thomas, 261 F. Supp. 263 (W.D. La. 1966) 10
Powell v. Alabama, 287 U.S. 45 (1932) 8

Ricks v. United States, —— F.2d —— (D.C. Cir. 1969, No. 20,919) 16

PAGE

Rinaldi v. Yeager, 384 U.S. 305 (1966) 8
Robinson v. California, 370 U.S. 660 (1962) 16, 17
Rutledge v. City of Miami, 267 F. Supp. 885 (S.D. Fla. 1967) 10

Sawyer v. District of Columbia, 238 A.2d 314 (D.C. Ct. App. 1968) 16
Shick v. United States, 195 U.S. 65 (1906) 12
Smith v. Bennett, 365 U.S. 708 (1961) 9, 14
State v. DeJoseph, 222 A.2d 752 (1966), cert. den. 385 U.S. 982 (1966) 11
State v. Thomas, 190 So.2d 909 (La. 1965) 10

United States v. Barnett, 376 U.S. 681 (1964) 12
United States ex rel. Privitera v. Kross, 239 F. Supp. 118 (S.D.N.Y. 1965) aff'd 345 F.2d 533 (2nd Cir. 1965) 16

Walling v. General Industries Co., 330 U.S. 545 (1947) 13
Weems v. United States, 217 U.S. 349 (1910) 17

Table of Statutes

Ark. Stat. Ann. §19-2416 (1947) 2, 11, 13
Ark. Stat. Ann. §41-103 (1947) 7
Ark. Stat. Ann. §41-104 (1947) 7
Ark. Stat. Ann. §41-216 (1947) 8
Ark. Stat. Ann. §41-605 (1947) 7
Ark. Stat. Ann. §41-805 (1947) 7
Ark. Stat. Ann. §41-806 (1947) 8
Ark. Stat. Ann. §41-1501 (1947) 7
Ark. Stat. Ann. §41-3215 (1947) 8
Ark. Stat. Ann. §44-115 (1947) 2
Ark. Stat. Ann. §44-509 (1947) 2
29 U.S.C. §206 17

Other Authorities

PAGE

21 Am. Jur. Ed., Criminal Law §603 16

Goldberg, Equality and Government, 39 N.Y.U.L. Rev. 205 (1964) 14

McRuer, Sentences, 27 Can. Bar Rev. 1001 (1949) 14

Model Defense of Needy Persons Act (1966) 10

Model Penal Code (Official Draft 1962) 15

NCCD Advisory Council of Judges, Guides for Sentencing 22 (1957) 15

Pilot Institute on Sentencing Under the Auspices of the Judicial Conference of the United States, 26 F.R.D. 231 (1959) 15

Providing Defense Services (A.B.A. 1967) 10

Rubin, The Law of Criminal Correction 238 (West Publ. Co. 1963) 15

1, Silverstein, Defense of the Poor in Criminal Cases in American State Courts (American Bar Foundation, Chicago, Ill., 1965) 10

Sutherland and Cressey, Principles of Criminology (5th ed. 1955) 14

IN THE

Supreme Court of the United States

No. 1368

October Term, 1968

CAPTAIN HENRY BECK, Superintendent of the Pulaski County Penal Farm; and CLINT CAVIN, Surety,

Petitioners,

v.

ROBERT WINTERS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari seeks review of a judgment entered in this case on February 25, 1969 by the Court of Appeals for the Eighth Circuit which affirmed an order of the United States District Court for the Eastern District of Arkansas granting a petition for a writ of habeas corpus. Both courts below held that respondent, an indigent sentenced to nine and one half months in prison, was denied rights guaranteed by the Sixth and Fourteenth Amendments when denied the assistance of counsel pursuant to the Arkansas practice of appointing counsel only in felony cases.

Statement

In 1965, Robert Winters, a 24 year old indigent Negro was convicted of "immorality" in violation of Ordinance No. 25-121 of the City of Little Rock, Arkansas.[1] Respondent and a white female co-defendant (who was charged with petit larceny as well as "immorality") were arrested at approximately 4:15 a.m., on May 13, 1965. They were brought before a judge of the municipal court of the City of Little Rock the same day for trial. Both were convicted. Respondent received a jail sentence of 30 days and a fine of $254.00, including court costs. Persons, like respondent, unable to pay such fines work them off at the Pulaski County Penal Farm at the rate of $1.00 per day, pursuant to Ark. Stat. Ann. §19-2416 (1947). He made no attempt to appeal from this conviction and was accordingly sentenced to prison for a total of 284 days.

At his trial in the municipal court, respondent was unrepresented by counsel. He did not ask for assistance of counsel and was not informed by the presiding judge, or anyone else, of a right to counsel, appointed or retained. Nor did the court advise him of the nature of the charge against him, the possible penalty, or that he had a right to make objections, cross-examine witnesses, present witnesses in his own behalf, or "appeal" to the circuit court of Pulaski County where he would have been entitled to a trial *de novo* before a jury, Ark. Stat. Ann. §§44-115, 509 (1947). After receiving testimony, the trial court asked both respondent and his co-defendant if they wished to make a statement. Both declined.

On October 20, 1965, respondent filed, as a poor person, a petition for a writ of habeas corpus, or in the alternative

---

[1] The ordinance is reprinted in Appendix C of the petition for writ of certiorari.

for a writ of error coram nobis, in the trial court, the municipal court of the City of Little Rock, alleging, *inter alia,* that he had been tried and convicted in violation of state and federal constitutions "without the benefit of counsel and without being advised of his right to counsel." Respondent requested relief against his unconstitutional restraint, conviction, sentence, and fine and sought release on his own recognizance pending consideration of the issues raised by the petition. The municipal court denied the petition October 27, 1965 and the same day a petition for habeas corpus, or alternatively for writ of error coram nobis was filed in the circuit court of Pulaski County. That court denied the petition on October 28, 1965.

The following day, respondent sought relief by petition for habeas corpus in the Supreme Court of Arkansas. On November 3, 1965, the supreme court entered an order staying execution of respondent's sentence pending consideration of the petition and releasing him on $100 bond. On December 20, 1965, the court denied the petition on the ground that Winters was charged in a misdemeanor, not "a felony case" and was not entitled to counsel, 239 Ark. 1151, 397 S.W.2d 364 (1965). A petition for writ of certiorari was denied, Justices Stewart and Black dissenting, 385 U.S. 907 (1966).

After denial of certiorari, Winters filed a petition for a writ of habeas corpus in the district court alleging (1) that he was "presently threatened with and subject to remission" to serve out his sentence and (2) that his conviction and sentence were unconstitutional in that:

1. He was unconstitutionally tried and convicted without benefit of counsel and without being advised of his right to counsel;

2. The penalties assessed against him by the municipal court of Little Rock deprived him of Fourteenth Amendment Rights in that the imposition of 254 days in jail in default of payment of his fine and court costs of $254.00 constituted imprisonment for no other reason than poverty;

3. The ordinance pursuant to which he was convicted violated the Due Process Clause of the Fourteenth Amendment in that it is vague, ambiguous, and uncertain.

On February 14, 1967, the district court dismissed the petition on the ground that, because he had been released on bond, respondent was not "in custody" so as to permit him to file a petition for a writ of habeas corpus. On application for a certificate of probable cause, the court of appeals, on March 31, 1967, remanded the cause to the district court "for a rehearing on the merits in conformity with the teaching of the Supreme Court of the United States in *Jones* v. *Cunningham,* 371 U.S. 236." On remand, the district court held that respondent's conviction and sentence of imprisonment for nine and one-half months constituted the adjudication of a "serious offense," at which the assistance of counsel was constitutionally required:

> We do say here, . . . that the interaction of the "dollar-a-day" statute of Arkansas with a $254 fine plus a 30-day jail sentence constituted a "serious offense," and the failure of the trial court to notify petitioner of his right to the assistance of counsel and offer him counsel if he was unable financially to retain counsel, rendered the judgment of conviction and sentence constitutionally invalid (281 F. Supp. 793, 801-02)

On appeal to the court of appeals, the judgment of the district court was affirmed:

> Appellants are correct in suggesting that the Supreme Court of the United States has not expressly extended the Sixth Amendment right to assistance of counsel to misdemeanor cases. We are firmly convinced, however, from the rationale of the decisions of the Supreme Court that the fundamental right to counsel extends to a situation where, as here, the accused has been found guilty of an offense, which has resulted in imprisonment for approximately nine and one-half months.
>
> The Supreme Court in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), in holding that the Sixth Amendment guarantee of the right to assistance of counsel is applicable to the states through the Fourteenth Amendment, proclaimed: "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Id. at 344.
>
> Appellants seem to regard the *Gideon* opinion as limiting the application of the Sixth Amendment to offenses which are characterized as felonies. We are not persuaded that the *Gideon* Court intended to circumscribe the application of its decision to such narrow confines. The Court did not draw a line between felonies and any and all misdemeanors. Indeed, consideration of the opinion in context leads us to conclude that the right to counsel must be recognized regardless of the label of the offense if, as here, the accused may be or is subjected to deprivation of his liberty for a substantial period of time. (407 F.2d 125, 127, 128)

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Correctly Held That the Arkansas Restriction of Appointment of Counsel at Trial to Those Indigent Defendants Charged With Felonies Under Arkansas Law Violates the Sixth and Fourteenth Amendents to the Constitution.

Respondent's Sixth and Fourteenth Amendment rights to the assistance of counsel are established by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). While it is true that Gideon was charged with a felony under Florida law, the decision of this Court in his case adumbrated an indigent's right to the assistance of counsel in terms and for reasons which do not admit of restriction on the basis of whether a state classifies the particular offense charged as a felony or a misdemeanor. The Sixth Amendment's right to the assistance of counsel applies "In all criminal prosecutions" and in *Gideon* the Court spoke broadly of "any person haled into court" and the right of "one charged with crime" (Id. at 344). It is difficult, moreover, to conceive the basis of a distinction which would find the right to counsel "a fundamental right essential to a fair trial" when a crime is denoted a felony and not when it is denoted a misdemeanor.[2] As the Court stated:

---

[2] In *Evans* v. *Rives*, 126 F.2d 633 (D.C. Cir. 1942), a case involving a federal misdemeanor, it was suggested that the right to counsel applied only to serious offenses. The court replied, "No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority and know of none making such a distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. The petitioner would be as effectively denied his liberty by a sentence to a year in jail for the crime of nonsupport of a minor

> . . . in our adversary system of criminal justice any person haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. (Ibid.).

This truth is as "obvious" for misdemeanor as for felony trials.

Whatever the limits, if any, of the constitutional requirement with respect to provision of counsel in traffic and other petty offenses, the distinction between felonies and misdemeanors adopted by the Supreme Court of Arkansas in respondent's case cannot serve to deny his right to counsel. In Arkansas, the distinction between felony and misdemeanor is arbitrary and cannot be rationally justified in terms of considerations which legitimately affect either the state's or a defendant's interest in provision of counsel. Generally: "A felony is an offense in which the punishment is death or confinement in the penitentiary." [3] "All other public offenses are misdemeanors." [4] Certain misdemeanors, however, may result in imprisonment up to three years at the penitentiary, which is in excess of the penitentiary sentences for certain felonies.[5] Indeed, many serious crimes are punishable as misdemeanors[6] and there are felonies

---

child as by a sentence to a year in jail for any other crime, however serious. And so far as the right to counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such a loss for a long one" (126 F.2d at 638).

[3] Ark. Stat. Ann. §41-103 (1947).

[4] Ark. Stat. Ann. §41-104 (1947).

[5] See e.g. Ark. Stat. Ann. §41-805 (1947) making a third conviction of illegal cohabitation a misdemeanor punishable by imprisonment in the penitentiary for not less than one, nor more than three, years; Ark. Stat. Ann. §41-1501 (1947).

[6] See e.g. Ark. Stat. Ann. §41-605 (1947) (assault with a deadly weapon).

that are punished no more heavily than misdemeanors.[7] In this case, respondent has been convicted of charges of immoral conduct, cf. *Callan* v. *Wilson,* 127 U.S. 540, 549 (1888), and sentenced to nine and one half months in jail for a misdemeanor. As the line of demarcation between felony and misdemeanor in Arkansas law is totally unrelated to the reasons that the right to counsel is constitutionally protected, a rule which makes provision of counsel turn on that distinction, itself violates the Equal Protection Clause. *Baxstrom* v. *Herold,* 383 U.S. 107 (1966); *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); see *McLaughlin* v. *Florida,* 379 U.S. 184, 190 (1964).

It is not, however, the artificiality of the Arkansas standard which alone supports denial of certiorari. If as *Gideon, supra,* held, counsel is required for a fundamentally fair trial, to ensure the integrity of the fact finding process, and that justice is done, assistance of a lawyer cannot be rationally withheld simply because one class of offenses may be punished more severely than another. Respondent's liberty is infringed if he is incarcerated for nine and one half months or for one year and one day; whether in the county penal farm or state penitentiary. The adversary system will operate no better because a charge carries with it a lesser penalty. In both classes of cases a defendant without counsel "lacks both the skill and knowledge adequately to prepare his defense even though he has a perfect one" *Powell* v. *Alabama,* 287 U.S. 45, 68, 69 (1932).

It was also recognized in *Gideon, supra,* that the fundamental right of one charged with crime to counsel cannot be realized "if the poor man charged with crime has to face his accuser without a lawyer to assist him" (372 U.S. at 344). The unfairness of permitting counsel for the rich while the poor go unrepresented continues if the right to

[7] See e.g. Ark. Stat. Ann. §§41-216, 806, 3215 (1947).

counsel is restricted only to those charged with felonies. The Due Process and Equal Protection Clauses are not satisfied by a state rule which permits the kind of trial a man enjoys to depend on the amount of money he has *except* in felony cases. Numerous decisions of the Court establish beyond question the inadmissibility of distinction between rich and poor in granting rights fundamental to the integrity of the fact finding process.[8]

In short, the court of appeals correctly held that the assistance of counsel is a fundamental right which cannot be denied on the basis of poverty and that neither the language of *Gideon, supra,* nor the reasons given to support it, permit denial of a fundamental right to an indigent merely because he may not have been charged with a crime labelled a felony under state law.

It is, therefore, no accident that the increasing trend of American jurisdictions is to reject any limitation on the right to counsel where the accused is charged with a misdemeanor and—at the very least—to find that the right of counsel attaches in any case where, as here, the penalty is greater than six months imprisonment. As early as 1963, the American Bar Foundation's study of this problem found:

> Two impressions emerge from the material gathered in the survey, which in most states was conducted during the summer and early fall of 1963. . . . The other impression is that the number of jurisdictions providing counsel in misdemeanors was on the increase at the time of the survey, partly in response

[8] *Griffin* v. *Illinois,* 351 U.S. 1, 17-19 (1956); *Eskridge* v. *Washington Prison Board,* 357 U.S. 214 (1958); *Burns* v. *Ohio,* 360 U.S. 252 (1959); *Douglas* v. *Green,* 363 U.S. 192 (1960); *Smith* v. *Bennett,* 365 U.S. 708 (1961); *Douglas* v. *California,* 372 U.S. 353 (1963).

to growing recognition that a good system of justice requires counsel for the misdemeanor as well as for the felony. 1, Silverstein, *Defense of the Poor in Criminal Cases in American State Courts,* pp. 126-127 (1965: American Bar Foundation, Chicago, Ill.).

Three years later the National Conference of Commissioners on Uniform State Laws took the view that counsel should be provided whenever the penalty "includes the possibility of confinement." However, the Commissioner's Model Defense of Needy Persons Act §§1, 2 (1966) contains a bracketed limitation to offenses punishable for more than six months in deference to "differences" as to whether the right extends to all cases or only to cases where the penalty is more than six months. The American Bar Association's Project on Minimum Standards, moreover, has decided that "Counsel should be provided in all criminal proceedings . . . regardless of their denomination as felonies, misdemeanors or otherwise" *Providing Defense Services* §4.1 (1967).

Several state courts have declined to find a right to counsel in misdemeanor cases but it is noteworthy that with few exceptions those cases arose in jurisdictions where the federal courts have held that habeas relief is available to void misdemeanor convictions obtained without assistance of counsel. Compare *Harvey* v. *Mississippi,* 340 F.2d 263 (5th Cir. 1965); *McDonald* v. *Moore,* 353 F.2d 106 (5th Cir. 1965); *James* v. *Headley,* —— F.2d —— (5th Cir. 1969, No. 25,892); *Bohr* v. *Purdy,* —— F.2d —— (5th Cir. 1969, No. 26,637); *Petition of Thomas,* 261 F. Supp. 263 (W.D. La. 1966); *Rutledge* v. *City of Miami,* 267 F. Supp. 885 (S.D. Fla. 1967); *Brinson* v. *Florida,* 273 F. Supp. 840 (S.D. Fla. 1967) with *State* v. *Thomas,* 190 So.2d 909 (La. 1965) and *Fish* v. *State,* 159 So.2d 866 (Fla. 1964); *Arbo* v. *Heg-*

strom, 261 F. Supp. 317 (D. Conn. 1966), with *State* v. *DeJoseph,* 222 A.2d 752 (1966), cert. den. 385 U.S. 982 (1966). And in *Duncan* v. *Louisiana,* 391 U.S. 145, 149 (1968) this Court rejected the misdemeanor-felony line as a constitutional basis for state denial of the right to jury trial, a right which *Duncan* acknowledges is not fundamental to a fair trial to the extent of the right to counsel.

Arkansas urges that the state's obligation to provide counsel for petitioner does not extend to one sentenced to nine and one half months in jail. Several reasons have been presented. First, it is contended that because of a claimed impossibility of furnishing counsel to *each and every person* accused of crime, counsel need not be appointed until the state legislature has acted to solve the problem. The premise of this argument is surely faulty, given the widespread acceptance of public responsibility to provide representation for misdemeanor defendants. The State failed to present any evidence in the trial court supporting a contention that it is incapable of meeting the burden so many other jurisdictions have met. But even granting the premise *arguendo,* the result would be to support, not detract from, the decision below that offenses punishable by nine and one half months confinement require appointment of counsel, for the court below's resolution made no attempt to include appointment in petty offense cases.

The state contended that a six month limitation will not relieve the state's burden because Ark. Stat. Ann. §19-2416 (1947) requires that fines, if not paid, be worked out at the rate of $1.00 per day. Respondent contends that the statute is unconstitutional, *infra* pp. 13-17, but even were it valid it could not be employed to justify denial of counsel to respondent. Its repeal or modification provides a convenient method to alleviate any burden caused by the obligation to provide representation in misdemeanor cases. The state cannot—on the one hand—contend that provision of counsel

is burdensome and—on the other—define offenses and punismments in a way which needlessly maximizes the burden.

Once it is accepted—as we believe it must be, in light of *Duncan, supra* and *Frank* v. *United States,* 37 U.S. L. Week 4437 (May 19, 1969)—that the federal courts are required to address themselves to the question of which petty offenses, if any, are exempt from the constitutional protection of right to counsel, then there is impressive authority for the proposition that—regardless of the outer boundary of the right—offenses punishable by more than six months, especially when they involve moral delinquency, require appointment of counsel. Cf. *Callan* v. *Wilson supra; District of Columbia* v. *Clawans,* 300 U.S. 617 (1937); *Shick* v. *United States,* 195 U.S. 65 (1906); *Duncan* at 391 U.S. 145 (1968). Cases adopting the six months rule as the boundary of the federal right to jury trial (at least in criminal contempt cases, where the rule is likely most tolerant of non-jury trials), such as *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966),[9] are especially persuasive, for the Court made perfectly plain in *Duncan,* 391 U.S. at 158, despite incorporating the jury trial requirement of the Sixth Amendment in the Fourteenth, that "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a particular defendant may never be as fairly treated by a judge as he would be a jury." Cf. *Destefano* v. *Woods,* 392 U.S. 631 (1968). *Gideon* v. *Wainwright,* however, stands for the proposition that a fair trial without counsel is hardly possible.

---

[9] *Cheff* must be read as adopting and applying a six month standard to the Court's famous dictum in *United States* v. *Barnett,* 376 U.S. 681, 695, n. 12 (1964):

> Some members of the Court are of view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses.

II.

The Unconstitutionality of Arkansas' Dollar-a-Day Statute Establishes the Correctness of the Judge Below.

The municipal court sentenced petitioner to 254 additional days in jail because of his inability to pay a fine and court costs of $254.00, pursuant to Ark. Stat. Ann. §19-2416 (1947). The dollar-a-day statute and its application in this case where challenged under the Eighth and Fourteenth Amendments by respondent in the district court and the court of appeals. Those courts did not reach the question, though squarely presented by the petition for habeas corpus, because they found that denial of respondent's right to counsel violated the Fourteenth Amendment and required the vacation of his conviction on that distinct ground. But since the unconstitutionality of Ark. Stat. Ann. §19-2416 supports the judgment below, it is properly urged here as a ground supporting denial of certiorari. *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947).

We submit that the statute is palpably unconstitutional. A system which enforces the payment of fines by imprisonment clearly effects different treatment of convicts depending on whether they are with or without funds to pay the fine. Two persons convicted of identical offenses under essentially similar circumstances and upon comparable records, and sentenced to pay the same fines, will walk out of court or be transported to the state jail depending entirely on how much money they have. As former Justice Goldberg has written:

> The "choice" of paying a $100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise $100. The resulting imprisonment is no more or no less than imprisonment for being poor, a doctrine which I trust this Nation has long since outgrown.

Goldberg, *Equality and Government,* 39 N. Y. U. L. Rev. 205, 221 (1964).

Respondent submits that a system of imprisonment for failure to pay a fine, unmitigated by any effort to accommodate itself to the poverty of some defendants, makes the real sentence a man gets depend on the amount of money he has, and that *Griffin* v. *Illinois,* 351 U.S. 12 (1956) and its progeny, have made clear that such a system is forbidden. E.g. *Burns* v. *Ohio,* 360 U.S. 252 (1959) (filing fee for motion for leave to appeal); *Smith* v. *Bennett,* 365 U.S. 708 (1961) (filing fee for state habeas corpus petition); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) (appointed counsel at trial); *Douglas* v. *California,* 372 U.S. 353 (1963) (appointed counsel for first appeal as of right). It should be noted that under an Arkansas law the indigent defendant is deprived of his liberty not because it is thought that the protection of the community or his reformation require it, but simply because he is poor and unable to pay the fine imposed:

> . . . when a fine is imposed it is tantamount to a declaration that neither the safety of the community nor the welfare of the offender requires the imprisonment of the offender and that the assumed values of punishment can be accomplished without imprisonment. Sutherland and Cressey, *Principles of Criminology* at 277 (5th ed. 1955).

Chief Justice McRuer of the High Court of Justice for Ontario, Canada has put it succinctly:

> A modest fine, with an alternative prison term, imposed upon a man who has not the ability to pay is in fact a sentence to prison, while a very substantial fine imposed on one of ample financial resources is an inconsequential punishment. McRuer, *Sentences,* 27 Can. Bar Rev. 1001, 1006 (1949).

Due process and equal protection do not sanction a system which makes a man's freedom dependent upon his ability to pay. Cf. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 668 (1966).[10]

In a case indistinguishable from this, *People* v. *Saffore*, 18 N.Y. 2d 101, 218 N.E. 2d 686 (1966), the New York Court of Appeals held that to make "a defendant who has no money or property . . . serve out a fine at $1 per day, in addition to the maximum term of imprisonment," violated both the state and federal constitutions:

> Since imprisonment for nonpayment of a fine can validly be used only as a method of collection for refusal to pay a fine, we should now hold that it is illegal so to imprison a defendant who is financially unable to pay.[11]

The court found its holding compelled particularly by the circumstance that the dollar-a-day confinement in de-

---

[10] Authorities who have considered the matter recognize the unfairness of the practice:

> In general one of the over-riding principles repeatedly urged is that the financial capabilities of the offender should be taken into consideration, because unless fines are proportioned to the defendant's ability to pay, they will be treated lightly by persons of means and will be an unbearable burden to the poor. Rubin, THE LAW OF CRIMINAL CORRECTION 238 (West Publ. Co. 1963).

The federal judges' pilot institute on sentencing recommended that:

> No fine should be imposed unless it reasonably appears that the defendant is financially able to pay it either at once or in installments under probation. *Pilot Institute on Sentencing under the Auspices of the Judicial Conference of the U.S.*, 26 F.R.D. 231, 380 (1959).

See also NCCD Advisory Council of Judges, GUIDES FOR SENTENCING 22 (1957); MODEL PENAL CODE Sec. 7.02 (Official draft, 1962).

[11] A rational purpose of imprisoning an indigent under an alternative fine-imprisonment sentence is hard to find. Coercion of the

fault resulted in the defendant being sentenced to a period of imprisonment in excess of the statutory maximum—a circumstance also present here.[12] Accord: *Sawyer* v. *District of Columbia,* 238 A2d 314 (D.C. Ct. App. 1968).

Moreover, in treating a convict without funds differently than one with money to pay a fine a sentencing court is, in effect, punishing the former because of his status as a poor person. In *Robinson* v. *California,* 370 U.S. 660 (1962) the Court held that the Eighth Amendment's prohibition of cruel and unusual punishment, applicable to the states through the Due Process Clause, proscribed California's attempt to make criminal an individual's status of narcotic addition. (Id. at 667). The failure of the defendant in this case to pay the fine was an "involuntary symptom" of his involuntary poverty, cf. *Ricks* v. *United States,* —— F.2d —— (D.C. Cir. 1969, No. 20,919); *Fenster* v. *Leary,* 20 N.Y.2d 309, 229 N.E.2d 426 (1967); *Baker* v. *Binder,* 274 F. Supp. 658 (W.D. Ky. 1967). To imprison the respondent for this reason, no matter how small the fine, or how short the term of incarceration, is cruel and unusual punishment of him for being poor:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual.

---

indigent to pay is clearly a rationally impossible motive, as the New York Court of Appeals noted in *People* v. *Saffore, supra,* see also 21 Am. Jur. Ed., CRIMINAL LAW, §603, and the cases cited in note 4 there. The indigent simply lacks the ability to pay. Coercion of a friend or relative to pay is a possible *sub rosa* purpose, but seems opposed to our fundamental understanding that no man should be penalized for the crimes of his friend or relative in which he himself did not participate.

[12] Compare *United States ex rel. Privitera* v. *Kross,* 239 F. Supp. 118 (S.D.N.Y. 1965) aff'd 345 F.2d 533 (2nd Cir. 1965) where the court relied on the fact that the state judge could have imposed a straight jail sentence up to a year in prison apart from the fine. In *Winters* case, however, the fine permitted the court to impose over eight fold more time in prison than the maximum.

> But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold. *Robinson* v. *California, supra,* at 667.

As the district court observed, despite the fact that the dollar-a-day statute is over 75 years old and the statute's standard of value is totally inconsistent with modern standards, compare 29 U.S.C. §206 (minimum wage: $1.60 per hour), the Arkansas legislature has not amended the rate at which an indigent "works off" his fine. Thus the state has not only chosen to punish the status of poverty but has done so at an unconscionable rate, unconstitutionally disproportionate to the value of petitioner's labor. *Weems* v. *United States,* 217 U.S. 349 (1910); compare U.S. Const. XIII.

CONCLUSION

For the foregoing reasons, Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

JACK GREENBERG
MICHAEL MELTSNER
NORMAN CHACHKIN
10 Columbus Circle
New York, New York 10019

JOHN WALKER
1820 West 13th Street
Little Rock, Arkansas

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

Attorneys for Respondent